

ST 98-37

Tax Type: SALES TAX

Issue: Responsible Corp. Officer - Failure to File or Pay Tax

STATE OF ILLINOIS  
DEPARTMENT OF REVENUE  
OFFICE OF ADMINISTRATIVE HEARINGS  
CHICAGO, ILLINOIS

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THE DEPARTMENT OF REVENUE  
OF THE STATE OF ILLINOIS

v.

"J.A. EYORE", as Responsible Officer  
of "Tigger, Co.",

Taxpayer

No. 96-ST-0000  
NPL: 0000, 0000  
IBT: 0000-0000

Christine O'Donoghue  
Administrative Law Judge

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**RECOMMENDATION FOR DISPOSITION**

**Appearances:** Mr. Alan Osheff, Special Assistant Attorney General for the Illinois Department of Revenue; Mr. James Harbert, Esq. of Hinshaw & Culbertson for "J.A. Eeyore".

**Synopsis:**

This matter comes on for hearing pursuant to "J.A. Eeyore" (hereinafter "Eeyore" or "taxpayer") timely protest of the Notices of Penalty Liability Nos. 0000, and 0000 issued on June 2, 1994 and December 9, 1994, respectively, for Retailers' Occupation Tax liability. These Notices of Penalty Liability were issued to "Eeyore" as a responsible officer of "Tigger, Co." pursuant to Section 13.5. The issues to be resolved at hearing are 1) whether the taxpayer was a responsible officer of "Tigger Co." and 2) whether the taxpayer's failure to pay the tax due was willful during the period of July 1, 1987 through September 30, 1988. Upon consideration of all the evidence, it is my recommendation that the Notice of Penalty be cancelled.

**Findings of Fact:**

1. The Department of Revenue established its *prima facie* case, inclusive of all jurisdictional elements, by the admission of the Notices of Penalty Liability Nos. 0000 and 0000 issued on June 2, 1994 and

December 9, 1994, respectively, to "J.A. Eeyore", as a responsible officer of "Tigger, Co." for the period of July 1, 1987 through September 30, 1988. Dept. Ex. Nos. 1 & 2.

2. "J.A. Eeyore" is currently employed at "Honey Bee" Company. He started work at "Honey Bee" on October 1, 1988. Prior to working for "Honey Bee", "Eeyore" worked for "Tigger, Co." in "Someplace", Illinois during the period of July 1987 through September 1988. "Eeyore" resigned from "Tigger" in September of 1988. Tr. p. 23.
3. "Tigger, Co." was a sub-jobber which is a distributor of gasoline and diesel fuel. "Tigger" operated both a wholesale and a retail business. Tr. p. 25.
4. A jobber has the ability to grant an oil company name to a particular business location. A sub-jobber buys unbranded product from an oil company or directly from another jobber. A sub-jobber cannot give an oil company name to a business. Tr. p. 24.
5. "Eeyore" was a sales representative for "Tigger" company. Tr. p. 26. His duties included calling customers, checking on inventories, and placing orders for gasoline. He scheduled appointments and generally would be out of the office most of the day calling on customers. He would occasionally pick up customer payments and drop off checks to "Tigger's" suppliers. Tr. p. 26. He also ensured that customer orders were filled. Tr. p. 26.
6. "Eeyore" was not a shareholder of "Tigger". Tr. p. 27.
7. "Eeyore" was primarily working out in the field, rather than at the office location. Tr. pp. 27, 28. "Eeyore" did not have any bookkeeping responsibilities. He did not keep the checkbook or decide when corporate checks should be drawn. Tr. p. 28. "Eeyore" was not involved with the accounts payable nor was he aware of "Tigger's" income and expenses on a monthly basis. Tr. p. 29.
8. "Eeyore" did not prepare the company's state tax returns. This was not part of his duties as sales representative. Tr. p. 30. "Eeyore" did not prepare or supervise the preparation of the company's federal tax returns. Tr. p. 30.
9. "Eeyore" did not hire or fire any employees. Tr. p. 30.

10. "Eeyore" was the corporate secretary. "Eeyore's" duties as secretary included signing documents if "Christopher Robin" was unavailable. Tr. p. 30.
11. "Alexander Robin" oversaw the company and directed the company's expansion efforts. He also directed the clerical staff, which consisted of two part-time employees. They prepared invoices and billings to customers and kept all the books for the company. Tr. p. 31. "Alexander Robin" made the decisions regarding the hiring and firing of "Tigger" employees. Tr. p. 31. He also decided when the creditors were to receive payment. Tr. p. 31. "Alexander Robin" maintained the checkbook for the corporation. Tr. p. 34.
12. "Christopher Robin" and "Eeyore" were signatories on "Tigger"'s bank account. Tr. p. 62.
13. "Eeyore" never reviewed the company's bank statements nor the accounts payable records. Tr. pp. 34, 35. "Eeyore" never reviewed the bills sent to creditors. Tr. p. 35.
14. The accounts receivable records were available to "Eeyore". Tr. p. 35. "Eeyore" used this information to collect on bills if a customer was delinquent on a payment. Tr. p. 36.
15. "Eeyore" did not handle any pre-paid sales tax matters for "Tigger". Tr. pp. 36-37.
16. "Alexander Robin" calculated the price "Eeyore" quoted to a customer while working in the field. The basic price for the gallon was taken from rack prices that were posted at "Tigger". Tr. p. 37. These rack prices were given by the oil companies. Tr. p. 37.
17. "Alexander Robin" would then calculate the customer's price by adding a profit margin, freight and taxes to this rack price. Tr. p. 37.
18. The price that was given to "Eeyore" was a combined figure, it was not broken out into a rack price and taxes. Tr. p. 39.
19. "Alexander Robin", along with the clerks, prepared all of the Retailers' Occupation Tax ("ROT") returns for "Tigger". Tr. pp. 68, 69. These clerks prepared the tax returns under the direction of "Alexander Robin". Tr. p. 97.
20. "Christopher Robin" or "Eeyore" signed these ROT returns. Tr. p. 69. On occasion, "Eeyore" signed an ROT return in blank. Tr. p. 75.

21. "Eeyore" would sign the check at the same time he signed the ROT tax return. Tr. p. 86. On occasion, "Eeyore" would follow up with "Alexander Robin" if a check did not accompany the tax return to confirm that the taxes were paid. Tr. p. 87.
22. "Alexander Robin" holds an accounting degree from the University of Illinois. Tr. p. 94.
23. "Alexander Robin" hired and fired employees for "Tigger". Tr. p. 98. He also directed the employees of "Tigger". Tr. p. 98. "Alexander Robin" also maintained the corporation's checkbook. Tr. p. 99. "Alexander" kept custody of the retained copies of state tax returns. Tr. p. 99. "A. Robin" kept all of the federal income tax returns also. Tr. p. 100. "A. Robin" also hired the accounting firm to prepared the withholding tax returns. Tr. p. 100.
24. Before working at "Tigger" Ltd., "Eeyore" worked for "Honey Pot" Oil Company, an oil distributor, from 1981 through 1985. Tr. p. 42. "Alexander Robin" was the president of "Honey Pot" Oil, which began operations in June of 1951. Tr. pp. 42, 102; Dept. Ex. No. 9.
25. "Eeyore" was also the secretary and sales representative for "Honey Pot" Oil Co. Tr. pp. 42, 43. During three years of his involvement with "Honey Pot", "Eeyore" was actually working in Wisconsin, building a gas station . Tr. pp. 88, 89.
26. "Honey Pot" Oil Co.'s Illinois Business Registration and motor fuel distributor's license were revoked on September 12, 1985. Tr. pp. 133, 179, 269; Dept. Ex. No. 9. "Honey Pot" Oil was in arrears for taxes to the Department of Revenue. Tr. p. 270.

### **Conclusions of Law:**

The Department seeks to impose personal liability on "J.A. Eeyore" pursuant to Section 13.5 of the ROTA, which reads, in pertinent part:

Any officer or employee of any corporation subject to the provisions of this Act who has the control, supervision or responsibility of filing returns and making payment of the amount of tax herein imposed in accordance with Section 3 of this Act and who willfully fails to file such return or to make such payment to the Department or willfully attempts in any other manner to evade or defeat the tax shall be personally liable for a penalty equal to the total amount of tax unpaid by the corporation, including interest and penalties thereon; The Department shall determine a penalty due under this Section according to its best judgment and

information, and such determination shall be prima facie correct and shall be prima facie evidence of a penalty due under this Section. ...

35 ILCS 120/13.5.<sup>1</sup> (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 ½).

In determining whether an individual is a responsible person the courts have indicated that the focus should be on whether that person has significant control over the business affairs of a corporation and whether he or she participates in decisions regarding the payment of creditors and disbursement of funds. See, e.g., Monday v. United States, 421 F.2d 1210 (7th Cir. 1970), cert. denied 400 U.S. 821 (1970). Liability attaches to those with the power and responsibility within the corporate structure for seeing that the taxes are remitted to the Government. *Id.*

The Department established its *prima facie* case of personal liability against the taxpayer through the introduction of its Notice of Penalty Liability. 35 ILCS 120/13.5 (formerly Ill. Rev. Stat. 1991, ch. 120, ¶ 452 1/2); Branson v. Department of Revenue, 168 Ill. 2d 247 (1995). The mere fact that other officers and employees also had control over financial matters does not itself exonerate "Eeyore" from liability or prove that he did not have the requisite control and responsibility as outlined under the statute. See, Gephart v. United States, 818 F.2d 469 (6th Cir. 1987).

For liability to attach under the statute, it must also be determined whether "Eeyore" willfully failed to remit the taxes due to the Department. Willfulness in regards to the statute is not merely limited to "intentional, knowing and voluntary acts". Monday, 421 F.2d at 1215. Willful conduct also encompasses a reckless disregard for obvious or known risks. *Id.* Furthermore, willful conduct does not require "bad purpose or an intent to defraud the government." The Department of Revenue v. Heartland Investments, 106 Ill. 2d at 29-30 (1985).

"Eeyore" gave credible testimony that he acted as the sales representative for "Tigger", just as he had been for "Honey Pot" Oil. This position necessarily kept him out in the field, contacting and working with customers at their place of business. The record indicates that he did not participate in either company's

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<sup>1</sup> The Uniform Penalty and Interest Act, 35 ILCS 735/3-7, provides for a personal liability penalty for taxes incurred as of January 1, 1994.

finances, nor did he directly control or supervise employees who handled the accounts payable or prepare the tax returns.

In the case at hand, the Department seeks to impose liability upon "Eeyore" for pre-paid sales tax which "Tigger" was required to remit to the Department on the pre-paid sales tax return, Form PST-1. Clearly, "Eeyore" was not well-versed as to the procedures a company must follow in remitting pre-paid sales tax to the Department and the record reflects that at least with respect to the ROT returns, "Eeyore" did take certain precautions, e.g. concurrently signing a check to the Department when signing a sales tax return. Moreover, the record reflects that the majority of the tax liability occurred after "Eeyore" had left "Tigger" in September of 1988. "Eeyore" Ex. No. 1. It appears that he did not have sufficient control or responsibility over "Tigger"'s finances or tax matters to determine that "Tigger" was not remitting its pre-paid sales tax to the Department. Nor was "Eeyore" obligated to investigate further to determine if "Tigger" was complying with the ROTA, given that his attention and duties lay in the sales area and he apparently had no responsibility with respect to taxes or the payment of creditors. Ensuring that "Tigger" was properly remitting pre-paid sales tax to the Department seems wholly outside of "Eeyore"'s responsibilities at "Tigger".

WHEREFORE, for the reasons stated above, it is my recommendation that the Notice of Penalty Liability be cancelled.

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Christine O'Donoghue  
Administrative Law Judge